

83 - 286

Office - Supreme Court, U.S.

FILED

AUG 8 1983

CASE NO. : _____

ALEXANDER L. STEVAS,
CLERK

=====

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

GWEN L. KILLOUGH,
Petitioner,

Vs.

STATE OF ALABAMA
Repondent,

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

FRANK L. THIEMONGE, III
Attorney for Petitioner
414 Grove Street
Montgomery, AL 36101

=====

QUESTIONS PRESENTED

1. May a trial court condition probation upon a payment of a specified sum of money when the sum has not been acknowledged, conclusively established in a criminal proceeding, or finally determined in civil litigation?

2. May a state court grant restitution in excess of the amount charged in the indictment when the defendant denies owing more than the amount alleged in the indictment and without a hearing to determine the defendant's ability to pay?

INDEX

	<u>Page</u>
QUESTIONS PRESENTED.....	i
CITATIONS.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS INVOLVED...	3
STATEMENT OF THE CASE.....	5
ARGUMENT.....	7
CONCLUSION.....	11
APPENDIX:	
Motion To Withdraw Guilty Plea And Enter Not Guilty Plea And Motion For A New Trial.....	1a
Withdrawal Of Guilty Peal.....	7a
Petition For Writ of Mandamus, Or In The Alternative, For A Writ Of Probation.....	9a
Petition For Writ Of Certiorari To The Court Of Criminal Appeals....	11a
The Opinion Of The Supreme Court Of The State Of Alabama.....	13a

CITATIONS

	<u>Page</u>
CONSTITUTION:	
Amendment XIV	3, 10
STATUTE:	
<u>28 U.S.C.</u> 1557(2)	2
CASES:	
<u>United States v. Touchet</u> , 658 Fed Rep 2nd 1074	7
<u>Atwater v. Roudebush</u> , D.C.III, 1976, 452 F. Supp. 622	7
<u>Phillips v. United States</u> , 679 F 2nd 192 (9th Cir. 1982)	8
<u>United States v. McLaughlin</u> , 512 F Supp. 907 (D Md 1981)	8
<u>Bearden v. Georgia</u> , 51 L. W. 4616	8

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Alabama, Which is not yet reported, appears in the appendix to this petition as well as the order of the Supreme Court of Alabama issuing a writ of certiorari to the Alabama Court of Criminal Appeals.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on June 10, 1983. The jurisdiction of this court is involved under 28 U. S. C. 1557(2).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

GWEN L. KILLOUGH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ALABAMA

Petitioner, Gwen L. Killough prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alabama entered in this cause on June 10, 1983. References to lower Court Opinion at page 1.

STATEMENT OF THE CASE

Appellant, Gwen L. Killough, was indicted by a Montgomery County Grand Jury on January 12, 1981, for violation of Code of Alabama 1975, § 13A-8-3, theft of property, first degree.

On July 17, 1981, a restitution and sentencing hearing was held and continued on July 17, 1981, at the conclusion of which the Appellant was sentenced to serve five years in the penitentiary. Defendant denied taking more than the \$1,361.94 for which she was indicted. Appellant was given a suspended sentence and placed on probation conditioned upon her serving twelve months in the county jail, paying fifty-eight thousand, seven hundred and fifty-five dollars (\$58,755) restitution and fourteen thousand, nine hundred and thirty-six dollars (\$14,936) court costs and expenses.

On August 27, 1981, Appellant filed a motion to withdraw her guilty plea and entered a plea of not guilty. (A 1-6). The motion was granted on September 4, 1981. (A 7,8). On October 15, 1981, the Alabama Court of Criminal Appeals granted the State's petition for writ of mandamus and directed the trial court to vacate and hold for naught its order of September 4, 1981. (A 9).

On March 25, 1983, the Supreme Court of Alabama granted a writ of certiorari to the Court of Criminal Appeals on the issue of whether a trial court may order restitution for an amount in excess of that charged in the indictment and in excess of the amount admitted by the Defendant. (A-11,12). This same court in an opinion affirming that of the Court of Criminal Appeals failed to address this issue and merely held that a defendant's probation may be conditioned on the defendant paying restitution in ex-

cess of the amount that the indictment alleges.

ARGUMENT:

This is in conflict with U. S. v. Touchet, 658 Fed Rep 2d 10/4, which plainly held that a trial court may not condition probation upon payment of a specified sum of taxes when the sum has not been acknowledged, conclusively established in a criminal proceedings, or finally determined in a civil litigation.

In Atwater v. Roudebush, D.C.III, 1976, 452 F. Supp. 622, essential components of procedural due process are right to notice and opportunity to be heard, which must be granted at meaningful time and in meaningful manner. The only formal and proper notice that the defendant ever had was an indictment of \$1,361.94, yet she was ordered by the appellate court to

make restitution of \$58,755.00 as a condition of her probation. The State does not claim that any hearing was held to determine the defendant's ability to pay such a large sum. She was merely ordered to pay it or go to jail for five years without probation. This is in violation of Bearden v. Georgia, 51 L. W. 4616.

In Phillips v. United States, 679F 2d 192 (9th Cir. 1982) and United States v. McLaughlin 512F Supp. 90/ (D Md 1981) cited by the Alabama Supreme Court are not identical to the instant case. In both Phillips and McLaughlin the defendants were indicted for the amounts for which restitution was granted, thus giving adequate notice in writing of the amounts to be claimed.

In McLaughlin the plea bargain terms are set forth in the record at arraignment; the defendant as a matter of record agreed

personally to the terms; she was indicted for the amount ordered in the restitution; and she agreed to that amount of restitution ordered while pleading guilty to only one count.

None of these facts exist in petitioner's case. The petitioner was indicted only in only in one court and only for \$1,361.94.

She pleaded guilty to this amount only.

The State does not claim that she ever admitted taking more than the amount in the indictment, nor do they claim that the

details of any agreement and an explanation of such agreement to the petitioner exists in the trial court record. In spite of

this and without adequate notice at any

time before any hearing the petitioner was

at the termination of said hearing ordered

by this trial court to pay not the \$1,361.94

but to pay \$73,691.00, or to serve a five

year term in the State Prison without

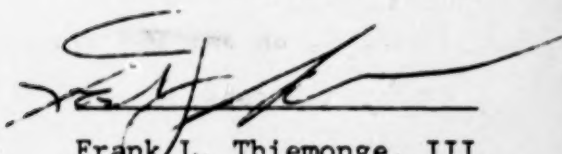
probation.

Petitioner urges that this violates whatever agreement that she had with the trial court and that it denies her right to due process of law guaranteed by the 14th amendment.

CONCLUSION

For the reasons alleged in the foregoing, the petitioner humbly prays that this petition for writ of certiorari be granted and the trial court be reversed.

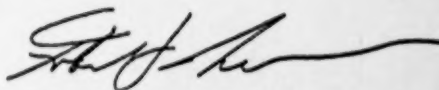
Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Frank L. Thiemonge, III', is written over a horizontal line.

Frank L. Thiemonge, III
Attorney for Petitioner
414 Grove Street
Montgomery, Alabama 36104
P. O. Box 3
Montgomery, Alabama 36101
Phone (205) 263-1037

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition upon Honorable Charles Graddick, Attorney General, State of Alabama, 250 Administration Building, Montgomery, Alabama 36104, by mailing a [REDACTED] copy of the same to him, postage prepaid, this 19 day of August, 1983.



Frank L. Thiemonge, III
Attorney for Petitioner

APPENDIX

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
Criminal Case No. 81-651-TH

STATE OF ALABAMA,

Plaintiff,

-vs-

GWEN L. KILLOUGH,

Defendant.

CRIMINAL NO.

81-651-TH

MOTION TO WITHDRAW GUILTY PLEA AND ENTER
NOT GUILTY PLEA AND MOTION FOR A NEW TRIAL

The Defendant through her counsel moves this Honorable Court to withdraw Defendant's guilty plea: and to enter a plea of not guilty and also to order a new trial and said Defendant assigns grounds as follows;

1. A failure by the State to make full disclosure of it's evidence to Defendant or Defendant's counsel violated Defendant's

agreement with the Court.

2. Defendant is being denied due process as guaranteed by both the Constitution of the United States of America and of that of the State of Alabama.

3. Defendant is in danger of being deprived of property and liberty without due process of law.

4. This Honorable Court was without jurisdiction to award restitution of a sum of money in excess of that alleged in the indictment.

5. The Court's rulings on the admissibility of evidence at the restitution hearing and it's judgment and sentence at the termination of said hearing is an unconstitutional application of the statutes under which the Defendant was indicted and tried.

6. This Court broke it's agreement with the Defendant and Defendant's counsel, by allowing at the close of the restitution hearing a showing by the State of thousands

of dollars in expenses, not one item of which was ever disclosed to the Defendant or her counsel. This violated the agreement Defendant had with the Court that the State would make full disclosure of all it's evidence to the Defendant and to her counsel.

7. The State repeatedly and deliberately failed to make full disclosure of it's evidence to Defendant and her counsel and this was in breach of Defendant's agreement with the Court as well as a breach of this Court's unenforced order to the State to make full disclosure to Defendant's counsel of it's case against Defendant.

8. The judgment and sentence of restitution by the Court is based on hearsay, conjecture and suspicion as well as the unsupported and unsworn statement of the District Attorney's office.

9. The State's Witnesses testified that in a period covering about five years that only four days had been audited, and

any money judgment by this Court in any other period than the four days audited is one based on hearsay, suspicion and conjecture-- a hearsay recap of the prosecuting witness's records and books.

10. Defendant was denied due process as guaranteed by the 14th amendment of the Constitution of the United States of America.

11. Defendant was denied her right to counsel as she was not allowed to present her case in an orderly fashion.

12. Defendant was denied her right to counsel as guaranteed by the United States Constitution as she was not allowed to present her defense in an orderly fashion but was constantly interrupted by the Court and District Attorney with questions and then engaged by the Court and District Attorney in argument as to her answers in a manner that confused, intimidated, and disorganized Defendant's effort to present an orderly defense.

13. Defendant has not been guilty of anything but pleaded guilty to the indictment only while under emotional duress from threats by the District Attorney's office and with confidence a fair hearing would exonerate her from the untrue charges of having stolen thousands when in fact Defendant has stolen not one dollar.

14. Courts failure to allow defense to question closely the financial background of the main prosecuting witness, Smith, was a denial by this Court of the Defendant's right to counsel as guaranteed by the Constitution of the State of Alabama and the United States of America.

15. The Court erred in allowing an offer of proof by the State of the expenses involved in the prosecution of a sum of money based on documents never offered or shown to Defendant or her counsel and said documents and amounts were only described by the unsworn word of the Assistant District Attorney.

JOHN NILE McGEE, JR.
Attorney for Defendant
P. O. Box 3
Montgomery, Alabama 36101
Phone 263-3707

Certificate of Service

I hereby certify that I have served
a copy of the above upon the Montgomery
County District Attorney's Office, by hand
delivering same, this 27th day of August,
1981.

John Nile McGee, Jr.

WITHDRAWAL OF GUILTY PLEA

FRIDAY, SEPTEMBER 4, 1981

COURT MET PURSUANT TO ADJOURNMENT
PRESENT THE HONORABLE H. RANDALL THOMAS,
JUDGE PRESIDING

STATE OF ALABAMA

VS. NO. CC-81-651-TH OFFENSE -
GWEN L. KILLOUGH THEFT I

This day came the State by its District Attorney and came also the defendant in her own proper person and by her attorney, Honorable John N. McGee, Jr., and it appearing to the court that the defendant heretofore filed a Motion to Withdraw Guilty Plea, and the court having heard argument from the District Attorney and the defendant's attorney is of the opinion that the defendant should be allowed to withdraw her guilty plea. It is therefore considered and ordered by the court that the defendant be allowed to

withdraw her guilty plea. It is further ordered by the court that this cause should be restored to the active trial docket and a trial date set. Defendant's bond is increased to \$10,000.00 by the court.

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

3 Div. 470

EX PARTE STATE OF ALABAMA,
EX REL JAMES H. EVANS,
AS DISTRICT ATTORNEY
FOR THE FIFTEENTH JU-
DICIAL CIRCUIT, AND
CHARLES A. GRADDICK,
ATTORNEY GENERAL OF
ALABAMA

In Re: State of Alabama v.
Gwen Killough

PETITION FOR WRIT OF MANDAMUS,
OR IN THE ALTERNATIVE, FOR A
WRIT OF PROBATION

Montgomery Circuit Court

IT IS ORDERED THAT the petition for writ of mandamus be and the same is hereby granted. The trial court is directed to vacate and hold for naught his order of September 4, 1981, purporting to set aside plea of guilty. Per Curiam. Tyson, DeCarlo, Bookout, and Bowen, JJ, concur.

WITNESS, Mollie Jordan,

Clerk of the Court of
Criminal Appeals, this
15th day of October,
1981.

Mollie Jordan
CLERK, COURT OF CRIMINAL
APPEALS OF ALABAMA

MARCH 25, 1983

THE STATE OF ALABAMA-----JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1982-83

82-437

Ex Parte: Gwen L. Killough

PETITION FOR WRIT OF CERTIORARI TO THE COURT
Of CRIMINAL APPEALS

Re: Gwen L. Killough vs. State of Alabama

Upon a preliminary examination of the petition in the above cause, the Court concludes that there is a probability of merit in the petition and has today granted the writ on the following issue:

"The issue is whether the appellate court erred in whole that the trial court may order restitution for an amount in excess of that charged in the indictment and in excess of the amount admitted by the Defendant."

IT IS THEREFORE ORDERED that the writ issue to the Court of Criminal Appeals and that this cause be set for oral argument in

accordance with Rule 39, Alabama Rules of
Appellate Procedure.

PER CURIAM.

TORBERT, C.J., MADDOX, JONES, SHORES,
AND BEATTY, JJ., CONCUR.

I, Dorothy F. Norwood, as
Acting Clerk of the Supreme
Court of Alabama, do hereby
certify that the foregoing
is a full, true and correct
copy of the instrument(s)
herewith set out as same
appears of record in said
Court.

Witness my hand this 28th
day of March 1983.

DOROTHY F. NORWOOD

Acting Clerk, Supreme Court of
Alabama

JUN 10 1983

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1982-83

Ex parte: Gwen L. Killough

Petition for Writ of Certiorari to the
Court of Criminal Appeals

(Re: Gwen L. Killough

82-437

vs.

State of Alabama)

MADDOX, JUSTICE.

The sole issue presented in this case is whether a Defendant who pleads guilty to an indictment can be required, as a condition of probation, to make restitution in an amount greater than that alleged in the incitement.

As the Court of Criminal Appeals correctly states in its opinion, the trial judge had authority to require Killough to make restitution as a condition of her probation. Code 1975, § 15-22-52(8). The Court of Criminal Appeals determined that other state courts, construing statutes similar to

15-22-52(8), had limited the amount specified in the indictment to which the Defendant pleaded guilty, but concluded that "a defendant can agree to pay a larger amount in restitution as part of a plea bargain agreement." Phillips v. United States, 679 F. 2d (9th Cir. 1982); United States v. McLaughlin, 512 F. Supp. 907 (D Md. 1981). We agree with the Court of Criminal Appeals and specifically hold that a defendant can be ordered to pay restitution in an amount in excess of the amount stated in the indictment, if the defendant made an agreement as part of a plea bargain.

The Court of Criminal Appeals, after reviewing the testimony taken at the sentencing hearing, was led to conclude that " a plea bargain existed in which appellant agreed to make full restitution." That court attached Appendix A to its opinion to support its conclusion.

After reviewing the opinion of the Court

of Criminal Appeals, the briefs of the parties, the argument made before this Court by counsel for the defendant and the state, we can conclude that Killough did agree to make restitution in an amount in excess of that charged in the indictment, and that the Court of Criminal Appeals was justified in holding that Killough agreed to make "full restitution," which that court determined was the sum of \$58,755.00 in this case. We hold, as did the Court of Criminal Appeals, that " if appellant wishes to avoid payment of full restitution, her alternative is to serve the five-year prison sentence."

The Court of Criminal Appeals found:

"Although we affirm appellant's conviction and find that the trial court committed no error in ordering restitution in an amount exceeding that specified in the indictment, we must remand this cause for a determination of whether the \$14,936.00 claimed as expenses was properly included as restitution. There is no clear indication in the record as to who incurred these expenses. If these expenses were incurred by the State and amounted to investigation

expenses they could not properly be included as restitution. United States v. Vaughn, 636 F. 2d 921 (4th Cir. 1980)."

We agree with that court's determination that a court cannot order restitution of expenses incurred by the state.

Based on the foregoing, we affirm the judgment of the Court of Criminal Appeals.

AFFIRMED.

Torbert, C. J., Faulkner, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

I, Dorothy F. Norwood, as Acting Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this the 10 day
of June 1983

Dorothy F. Norwood
Acting Clerk, Supreme Court of
-16- a Alabama